Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D-25NCC-5 OF 2011
MOHAMAD ARIFF J
5 JULY 2011

Civil Procedure — Contempt of court — Committal proceedings — Application for — Statements by first respondent to protest increase in water tariff — Statements made at closed door meeting — Statements subsequent reported in 'Harakah' — Whether statements attacked plaintiff's integrity and propriety in such a way as calculated to interfere with course of justice — Whether would lead court to be hesitant to find in favour of plaintiff in ongoing suit — Freedom of speech and expression — Rules of the High Court 1980 O 52 r 2 — Federal Constitution art 10(1)(a) & 10(2)(a)

Constitutional Law — Fundamental Liberties — Freedom of speech and expression — Sub judice — Comment touching on-going active litigation — Whether comment attacked merits of ongoing litigation — Sub judice rule molded in light of fundamental liberties provisions — Sensitivities of average Malaysian

The first respondent was counsel who represented the State Government of Selangor in a suit instituted by the present applicant in relation to a dispute over the State Government's refusal to consent to an increase in water tariffs. The alleged contempt related to certain statements made by the first respondent to a group of representatives from 30 Community Religious Schools (*Sekolah Agama Rakyat*) as part of a campaign to protest the increase in water tariff. It was further given at a closed door meeting. The above statements were subsequently reported by *'Harakah'*, a publication of PAS with a circulation limited to party members. The second respondent was sued as the editor of *Harakah*. The article stated, inter alia, that the applicant's attempted to increase water tariff was not bona fide and genuine in view of the suspicious substantial liabilities which was said to be 'impossible to have been accumulated' by the said plaintiff. The applicant contended that the objection was focused on the word *'mustahil'*, and this indicated and cast innuendos on the impropriety and integrity of the applicant, Syabas, which amounted to a direct attack on the credibility and integrity of the applicant so as to be viewed as calculated to interfere with the course of justice and therefore will likely interfere, or has interfered with, the due process of law and the course of justice in relation to the ongoing suit. The respondents however, argued that there was

no comment made in relation to the on going suit, and hence there was no issue of sub judice to speak of in the first place.

Held, dismissing the application with costs:

(1) The preliminary governing principles on sub judice and contempt require the court to tread very carefully when an allegation of contempt or to commit a citizen to prison for it, comes before the court. The court has to be satisfied on a high burden of proof that the administration of justice has been sullied or compromised. Ultimately, the test of possible or likelihood of prejudice has to have reference to the professional judge who will be hearing the case, not a collection of layman jurors — a system which has ceased to exist in our system of civil litigation. The court would have thought it will require more than a criticism of a litigant in a media of limited circulation (such as *Harakah*) to influence a judge to be somehow prejudiced against the litigant criticised (see para 39).

(2) The occasion, and the briefing, was in relation to the campaign, which itself was part of a wider public discourse on the water tariff issue. This wider discourse was actively carried in the electronic and print media. Indeed, the whole issue of privatisation of water resources had been discussed at length by members of the public well before the filing of the Syabas suit in 2010. The practical reality and law have somehow to find an accommodation based on considered principles (see para 33).

(3) It is all a matter of proportion and circumstance. If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an on–going active suit, there will obviously be a breach of the sub judice rule and will be an act of contempt. However, these elements were not found in the present case. In a larger constitutional context, the law of contempt must necessarily bend to the higher liberty of freedom of expression, not the reverse (see paras 35–36).

(4) The common law rule in relation to sub judice have to be molded in the light of the fundamental liberties provisions. The court cannot believe the sensitivities of the average Malaysian can be so different so as to incline the court to adopt a completely different juristic approach which relegates freedom of expression below the sub judice rule. On the present facts, the allegation of contempt was not proven against the respondents (see paras 37–38 & 40).

[Bahasa Malaysia summary

Responden pertama merupakan peguamcara mewakili Kerajaan Negeri Selangor dalam guaman yang dimulakan oleh pemohon ini berhubung satu pertikaian mengenai keengganan Kerajaan Negeri untuk membenarkan kenaikan tarif air. Dakwaan penghinaan berhubung beberapa pernyataan

dibuat oleh responden pertama kepada sekumpulan wakil daripada 30 Sekolah Agama Rakyat ('Sekolah Agama Rakyat') sebagai sebahagian daripada kempen untuk memprotes kenaikan tarif air. Pernyataan selanjutnya diberikan dalam satu perjumpaan tertutup. Pernyataan-pernyataan di atas dilaporkan berikutnya oleh *Harakah*, sebuah penerbitan yang diedarkan terhad kepada ahli-ahli parti. Responden kedua disaman sebagai editor *Harakah*. Artikel tersebut menyatakan, antara lainnya, bahawa cubaan pemohon untuk meningkatkan tarif air adalah tidak secara suci hati dan ikhlas berikutan liabiliti-liabiliti besar meragukan yang dikatakan 'mustahil untuk dikumpulkan' oleh plaintif tersebut. Plaintif menghujahkan bahawa bantahan difokuskan kepada perkataan 'mustahil', dan ini menunjukkan dan melemparkan sindiran ke atas kesumbangan dan integriti pemohon, Syabas, yang merupakan serangan secara terus ke atas kredibiliti dan integriti pemohon dan boleh dilihat sebagai perkiraan untuk campur tangan dalam perjalanan keadilan and oleh itu berkemungkinan akan mencampur tangan dalam, atau telah mencampur tangan dalam, proses undang-undang dan perjalanan keadilan berhubung guaman yang sedang berjalan. Responden-responden bagaimanapun, menghujahkan bahawa tidak terdapat sebarang komen yang dibuat mengenai guaman yang sedang berjalan dan oleh itu tidak terdapat isu *sub judice* untuk diperkatakan sejak awal.

Diputuskan, menolak permohonan dengan kos:

(1) Prinsip utama mengenai *sub judice* dan penghinaan memerlukan mahkamah untuk meneliti secara berhati-hati apabila pertuduhan penghinaan atau untuk menyabitkan seseorang warganegara ke penjara kerananya, dikemukakan ke mahkamah. Mahkamah perlu berpuas hati atas beban bukti yang kukuh bahawa pentadbiran keadilan telah dicemari atau dikompromi. Kesudahannya, ujian mengenai kemungkinan atau kebarangkalian prejudis mempunyai hubungan dengan hakim professional yang akan mendengar kes tersebut, bukannya sekumpulan juri-juri awam — sistem yang tidak lagi wujud dalam sistem pendakwaan sivil. Mahkamah menganggap ia memerlukan lebih daripada kritikan mengenai pendakwa dalam media edaran terhad (seperti *Harakah*) untuk mempengaruhi seorang hakim untuk bersikap prejudis terhadap pendakwa yang dikritik (lihat perenggan 39).

(2) Peristiwa dan maklumat berhubung kempen tersebut, adalah sebahagian daripada perbincangan awam meluas mengenai isu tarif air. Perbincangan meluas ini dijalankan secara meluas dalam media elektronik dan cetak. Semestinya, keseluruhan isu penswastaan sumber air telah dibincangkan secara panjang lebar oleh masyarakat umum sebelum pemfailan guaman Syabas pada 2010. Kenyataan praktikal dan undang-undang bagaimanapun telah menemui penyesuaian berdasarkan prinsip-prinsip yang dipertimbangkan (lihat perenggan 33).

(3) Ini semua merupakan perkara mengenai pembahagian dan keadaan. Sekiranya komen mencabar merit-merit pendakwaan yang sedang berjalan, sebagai contoh, atau menimbulkan fitnah terhadap kebebasan dan integriti kehakiman dan proses kehakiman di dalam konteks guaman yang sedang aktif dijalankan, itu adalah jelas merupakan pelanggaran undang-undang *sub judice* dan merupakan tindakan penghinaan. Walau bagaimanapun, elemen-elemen ini tidak ditemui di dalam kes ini. Di dalam konteks perlembagaan secara menyeluruh, undang-undang penghinaan seharusnya berpandukan kebebasan bersuara, bukan sebaliknya (lihat perenggan 35–36).

(4) Prinsip *common law* berhubung *sub judice* harus dilihat dari segi peruntukan-peruntukan kebebasan asasi. Mahkamah tidak boleh mempercayai sensitiviti seseorang rakyat Malaysia akan menjadi sangat berlainan sehingga menyebabkan mahkamah perlu mengambil pendekatan undang-undang yang menurunkan kebebasan bersuara di bawah undang-undang *sub judice*. Berdasarkan fakta-fakta ini, dakwaan penghinaan tidak dibuktikan terhadap responden-responden (lihat perenggan 37–38 & 40).]

Notes

For cases on commital proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1931–1962.

For cases on freedom of speech and expression, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2388–2407.

Cases referred to

Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Others [1986] 2 MLJ 193, SC (refd)

Attorney General v Times Newspaper Ltd [1973] 3 All ER 54, HL (refd)

B (JA) (An Infant), Re [1965] 1 Ch 1112 (refd)

Bramblevale Ltd, Re [1970] Ch 128, CA (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, HC (refd)

Dagenais v Canadian Broadcasting Corporation (1995) 120 DLR 12, SC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

HE Kingdon v SC Goho, Re [1948] MLJ 17, HC (refd)

Hinch v Attorney General of Victoria (1988) 164 CLR 15, HC (refd)

Mediacorp News Pte Ltd & Ors v Mediabanc (Johor Bahru) Sdn Bhd & Ors (Lim Leong Wuoh & Ors, proposed contemot parties) [2010] 5 MLJ 562; [2011] 5 CLJ 455, HC (refd)

Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 32, CA (refd)

Wallersteiner v Moir [1974] 3 All ER 217, CA (refd)

Legislation referred to

Federal Constitution art 10(1)(a), (2)(a)
Rules of the High Court 1980 O 52 r 2

Max Yong Boon Swee (Kiru & Yong) for the applicant.
Tommy Thomas (Yusmadi & Yusof with him) (Tommy Thomas) for the first respondent.
Mohd Hanipah Maiden and Azhana for the second respondent.
Tieh Siaw Siong (watching brief) (SS Tieh) for the Bar Council.

Mohamad Ariff J:

PROCEDURAL INTRODUCTION

[1] This court had granted leave earlier to the applicant to apply for an order of committal against the present respondents under O 52 r 2 of the Rules of the High Court, since at that ex parte stage of leave application, I was satisfied, on the materials submitted before this court, the application was not frivolous or vexatious, and at that stage all that the applicant had to show was a prima facie case of contempt without this court needing to go into the full merits of the matter.

[2] At the present stage of a full hearing for an order of committal against these respondents, I have had the advantage of the replies from each of the respondents, and aided by very detailed submissions by counsel representing the parties, the allegation of contempt can now be seen in its totality and properly evaluated by this court.

PRELIMINARY PRINCIPLES

[3] It will be useful to clarify at the outset three important preliminary principles which should guide and control the court's jurisdiction to punish for contempt. One of these principles was highlighted by the Court of Appeal in the leading case of *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 32 which quoted an earlier leading decision of *Arthur Lee Meng Kwang v Faber Merlin (M) Bhd & Others* [1986] 2 MLJ 193, and that important principle is this. Committal is a very serious matter and the courts must proceed very carefully before making an order to commit someone to prison. Rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. See also the English case of *re-B (JA) (An Infant)* 1 Ch 1112 as a source authority referred to by our courts for the principle outlined.

[4] A second preliminary important principle relates to standard of proof.

The standard of proof required in contempt of court proceedings is proof beyond reasonable doubt. It goes without saying that where a doubt exists, it should be resolved in favour of the alleged contemnor. See eg Lord Denning in *Re Bramblevale Ltd* [1970] Ch 128:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honored phrase, it must be proved beyond all reasonable doubt.

[5] *Re Bramblevale* has been applied in local cases such as the recent decision in *Mediacorp News Pte Ltd & Ors v Mediabanc (Johor Bahru) Sdn Bhd & Ors (Lim Leong Wuoh & Ors, proposed contemot parties)* [2010] 5 MLJ 562; [2011] 5 CLJ 455.

[6] The third preliminary important principle is in relation to the 'root principle', and the purpose for which the courts inherent power to punish a contempt is founded. This is addressed, for instance, in *Re HE Kingdon v SC Goho* [1948] MLJ 17:

> But the root principle on which this inherent power to punish a contempt is founded, and the purpose for which it must be exercised is not to vindicate the dignity of the individual judge or the judicial officer of the court or even of the court itself but to prevent an undue interference with the administration of justice in the public interest. (per Brown J, at p 18)

[7] Thus stated, the law of contempt has less to do with the direct litigants but is more concerned with upholding the administration of justice. This point has to be emphasised and clarified because there are some old case authorities which have a tendency to cloud the issue. And this is particularly true in that specific area of the law of contempt which touches on the so-called 'sub judice' rule.

THE SUB JUDICE RULE

[8] This present case directly concerns the 'sub judice' rule. Nigel Lowe and Brenda Sufrin, 'The Law of Contempt' (a relevant commentary cited by counsel for the applicant, Mr Max Yong) describes it simply and succinctly as follows: 'The law on what may be published about current legal proceedings is popularly known as the sub judice rule'. The learned authors also added this observation:

> Contempt of court as it applies to publications which interfere with due course of justice in particular proceedings had its origins in an age when there was no photography, the concept of the tabloid press and of newspapers as a virtual branch of the entertainment industry was undreamed of and indeed before the word 'media' was invented. (At p 68 of the text)

[9] Thus in some old cases the sub judice rule is made to appear as if it extended to the publication of anything which was likely or 'tends to excite prejudice against the parties' while the litigation was pending. In a 1742 case (*St James Evening Post* case) a more colourful description was used namely contempt 'by prejudicing mankind against persons before the case is heard. This colourful phrase also made an appearance in a more modern setting in the English Court of Appeal in *Attorney General v Times Newspaper Ltd* [1973] 3 All ER 54, but Lord Denning MR placed it in its proper context by stating:

> When litigation is pending an actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to a cause. Even if the person making the comment honestly believes it to be true, still it is contempt of court if he pleaded as the truth before it is ascertained in the proceedings. To that rule about a fair trial, there is this further rule about bringing pressure to bear on one of the parties to the cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain. The law should be maintained in its full integrity. We must not allow 'trial by newspaper' or 'trial by television' or 'trial by any medium' other than the courts of law. This law applies only when litigation is pending and is actively in suit before the court and there must appear to be 'a real and substantial danger of prejudice' to the trial of the cause or matter or to the settlement of it.

[10] This passage has been approved by our own Court of Appeal in *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 where Heliliah JCA (as Her Ladyship then was) stated:

> The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the sub judice rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that they have to be established an actus reus and mens rea to cause certain publications which would have a prejudicial effect on the criminal proceedings … (at p 714).

[11] As stated by the English Court of Appeal, it must be necessary to establish that the impugned publication carries a real and substantial danger of prejudice to the trial of the matter. It cannot be a mere matter of speculation.

[12] By way of completeness, it should be noted the case went up on appeal to the House of Lords, and the decision of the Court of Appeal was reversed. Nevertheless, the general principles stated by Lord Denning, as quoted above, were not expressly departed from.

[13] Lord Reid, for instance, said:

> There is ample authority for the proposition that issues must not be prejudged in a manner likely to affect the mind of those who may later be witnesses or jurors. But little has been said about the wider proposition that trial by newspaper is intrinsically objectionable …
>
> I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of the possible effect on that particular case but also of its side effects which may be far reaching. Responsible 'mass media' will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and if the mass media are allowed to judge, unpopular people, and unpopular causes will fare very badly (at p 300).

[14] Lord Reid also addressed the issue of the need to establish a 'real risk' thus:

> I think the true view is that expressed by Lord Parker CJ in *Reg v Duffy, Ex Parte Nash* [1960] 2 QB 188, 200, that there must be 'a real risk, as opposed to a remote possibility'. That is an application of the ordinary de minimis principle. There is no contempt if the possibility of influence is remote. If there is some but only a small likelihood, that may influence the court to refrain from inflicting any punishment. If there is a serious risk some action may be necessary. And I think that the particular comment cannot be considered in isolation when considering its probable effect … (at pp 298–299)

[15] It might also be appropriate at this conjuncture to mull over what Lord Diplock had to say on matters of general public interest:

> I entirely agree that discussion, however strongly expressed, on matter of general public interest of this kind is not to be stifled merely because there is litigation pending arising out of the particular facts to which general principles discussed would be applicable. If the arousing of public opinion by this kind of discussion has the indirect effect of bringing pressure to bear on a particular litigant to abandon or settle a pending action, this must be borne because of the greater public interest in upholding freedom of discussion on matters of general public concern. (at p 313)

[16] This issue of 'the greater public interest' will be addressed subsequently in this judgment.

THE BACKGROUND FACTS

[17] On the facts of this present application, the first respondent is the counsel who is representing the State Government of Selangor in a suit instituted by the present applicant in relation to a dispute over the State Government's refusal to consent to an increase in water tariffs. The alleged

contempt relates to certain statements made by the first respondent and the subsequent reporting of the statements by *Harakah*, a publication of PAS with a circulation limited to party members. The second respondent is being sued as the editor of *Harakah*.

[18] It is necessary to place this dispute in context by quoting the alleged objectionable publication. I do so now. The *Harakah* news report appears as exh FN1 to the affidavit of Fahda Nur bt Ahmad Kamar:

> SAR bantu kempen bantah kenaikan tariff air SHAH ALAM: Bagi menyokong kempen digerakkan Kerajaan Negeri, borang petisyen membantah kenaikan tariff air telah disampaikan Pengurusi Jawatankuasa Pendidikan Tinggi dan Pembangunan Modal Insan Negeri, Dr. Halimah Ali kepada 30 wakil Sekolah Agama Rakyat (SAR) di bangunan SUK, baru-baru ini.
>
> *Majlis yang berlangsung di tingkat 22 itu turut mendengar taklimat peguam yang mewakili Kerajaan Negeri dalam kes saman terhadap Syabas, Nur Fahda Ahmad Kamar.*
>
> Kempen tersebut dilakukan selepas beberapa siri rundingan dengan Syabas dan Kerajaan Persekutuan menemui jalan buntu. Lebih 100,000 tandatangan rakyat Selangor akan dikumpulkan bagi menyokong kempen tersebut sebelum diserahkan kepada Yang Di-Pertuan Agong di Istana Negara, 5 Disember ini.
>
> *Dalam taklimatnya, Nur Fahda berkata, adalah mustahil bagi syarikat bekalan air menanggung kerugian dan hutang yang banyak kerana air adalah keperluan manusia.*
>
> 'Lebih 71 peratus kendungan tubuh manusia adalah air,' katanya.
>
> *Sehubungan itu beliau melahirkan keraguan dengan hutang terkumpul Syabas pada 2005 berjumlah RM2.9 bilion, Puncak Niaga (RM1.3 bilion), Splash (RM1.6 bilion) dan Abbas (RM640juta).*
>
> *Selain itu, katanya bagi menyelamatkan Syabas, Kerajaan Persekutuan turut memberikan pinjaman mudah (soft loan) berjumlah RM320 juta dengan syarat yang sangat istimewa seperti tempoh tangguh (grace period) selama lima tahun.*

[19] I have italicised those parts which are objected to by the applicant, ie paras 2, 5, 6 and 8 of the news report.

[20] Just what is the precise nature of the complaint by the applicant? It is neatly summarised in para 11 of the supporting affidavit affirmed by Dato' Ruslan bin Hassan. It is also well expressed in the statutory statement, and I quote:

> … the publication and circulation of Harakah newspapers containing the statements and quantum of liabilities a set out in paragraphs 4(a) and 4(b) of the Statement Pursuant to Order 52(2) of the Rules of the High Court were inaccurate and incorrect because these statements did not reveal the inclusions capital

investments and expenditures as stated in the affidavit in support of Dato' Ruslan bin Hassan … which was not revealed in the said article published and such actions and conduct were calculated to cast doubts and suspicion on the accounts of the Plaintiff and was calculated to give rise to a reasonable and objective impression on an ordinary reasonable reader of average intelligence that the Plaintiff … in the said case was insolvent and the attempt to increase water tariff was not bona fide and/genuine in view of the suspicious substantial liabilities which was said to be 'impossible to have been accumulated' by the said Plaintiff … casting innuendos on the impropriety and integrity of the said Plaintiff which amounted to a direct attack on the credibility and integrity of the said Plaintiff and this is calculated to interfere with the course of justice and therefore will likely interfere or has interfered with the due process of law and the course of justice, in that the High Court should be hesitant to find In favor of the said Plaintiff in the said case hence the 1st Respondent has committed criminal contempt against this Honourable Court.

[21] In this connection, counsel for the applicant argues the objection is focused on the word 'mustahil', and this connotes and casts innuendos on the impropriety and integrity of the applicant, Syabas, which amounts to a direct attack on the credibility and integrity of the applicant so as to be viewed as calculated to interfere with the course of justice and therefore will likely interfere, or has interfered with, the due process of law and the course of justice in relation to the ongoing suit.

THE CONSTITUTIONAL DIMENSION: ART 10(1)(a)

[22] Both respondents, through counsel (Mr Tommy Thomas and Encik Hanipah Maidin respectively), have raised an issue of constitutionality based on art 10(1)(a) read in conjunction with art 10(2)(a), reading:

10(1) Subject to Clause (2) …

(a) Every citizen has the right to freedom of speech and expression;

…

(2) Parliament may by law impose —

(a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or *to provide against contempt of court*, or incitement to any offence … (Emphasis added.)

[23] By resorting to the constitutional provision in our Federal Constitution, the first respondent argues she has the right to comment on a matter of public interest which has entered the public domain for some time now, namely the issue of Syabas wanting to increase water tariffs against the objection of the

Selangor State Government, since after all, aside from being the counsel for the State Government in the above mentioned suit, she is also a member of a review committee appointed by it on water resources. Although legislation exists to regulate freedom of speech and expression in relation to contempt of court, the sub judice rule cannot be so interpreted as to render her constitutional rights illusory.

[24] The second respondent relies on these same constitutional provisions to support *Harakah's* right to media freedom.

[25] The principle established in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 that the court should test the validity of state action with regard to fundamental rights by considering whether it directly affects the fundamental rights or whether its inevitable effect or consequence is such that it makes their exercise ineffective and illusory, is raised in support of this position.

[26] This issue of constitutionality is important, particularly in the context of not just rights in the abstract but also in terms of present day practical realities where the impact and influence of electronic media have to be given due recognition. The realities will determine the reach of the sub judice rule when applied to the particular facts. It will therefore be inappropriate sometimes to apply principles from older authorities to solve legal problems of the present.

[27] Part of the practical realities also relates to the demise of the jury system in Malaysia. In a jurisdiction such as in Malaysia, the evaluation of the risk to administration of justice has to consider that it will be a professional judge who will be the person ultimately to be addressed, not jurors.

[28] Another issue that arises on the facts of the present case concerns the right of a counsel acting for a party in litigation to comment on a matter which touches an on-going active litigation. This is the position the first respondent finds herself in. She is counsel for the State Government in the litigation brought against it by Syabas. Once papers are filed, must counsel then desist from commenting on the case, and if some comment is made to the press or the public, or a section thereof, and what are the permissible limits in law?

[29] On the facts of the present case, however, it is argued by the respondents that there was no comment made in relation to the on-going suit, and hence there was no issue of sub judice to speak of in the first place.

[30] It is therefore very necessary to scrutinise the underlying facts of this dispute carefully, and set the facts against the allegation of sub judice and

contempt alleged by the applicant.

SCRUTINY OF THE UNDERLYING FACTS

[31] The essence of the complaint then appears as false statements being made that, on an objective view, might lead a reasonable reader of average intelligence to believe the plaintiff was insolvent and not bona fide in requesting for the increase in water tariffs, and further, these statements attack the plaintiff's integrity and propriety in such a way as calculated to interfere with the course of justice, or likely to oo so, since it will lead the court to be hesitant to find in favor of the plaintiff in the ongoing suit.

[32] As I stated earlier it is necessary to study the report very carefully and determine whether this news report has the tendency suggested. I have quoted the entire news report earlier. In so doing, the exact setting has to be appreciated. The report, I find, alludes to a 'taklimat' or briefing given to a group of representatives from 30 Sekolah Agama Rakyat as part of a campaign to protest the increase in water tariff. It was further given at a closed door meeting.

[33] The occasion, and the briefing, was in relation to the campaign, which itself was part of a wider public discourse on the water tariff issue. This wider discourse was actively carried in the electronic and print media. Indeed, as counsel for the first respondent argues, the whole issue of privatisation of water resources has been discussed at length by members of the public well before the filing of the Syabas suit in 2010. The issue then narrows itself to the question whether public debate on this must come to an abrupt stop when a writ is filed. At this juncture practical reality and law have somehow to find an accommodation based on considered principles. And here the applicable principles are best extracted from more current cases. One such persuasive authority is the Australian decision of *Hinch v Attorney General of Victoria* (1988) 164 CLR 15, where the High Court of Australia said:

> It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be litigant.

A MEDIA FREEDOM, FAIR COMMENT AND FAIR TRIAL

[34] Mr Tommy Thomas also cites with full force Lord Denning's crispy statement of the relevant law in *Wallersteiner v Moir* [1974] 3 All ER 217, which is worth repeating with full contemplation:

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> I know that it is commonly supposed that once a writ is issued, it puts a stop to discussion. If anyone wishes to canvas the matter in the press or in public, it cannot be permitted. It is said to be sub judice. I venture to suggest.that it is a complete misconception. The sooner it is corrected, the better. If it is a metter of public interest, it can be discussed at large without fear of thereby being in contempt. Criticisms can continue to be made and can be repeated. *Fair comment does not prejudice a fair trial.* (Emphasis added.)

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[35] If I may add, it is all a matter of proportion and circumstance. If a comment attacks the merits of an ongoing litigation, for example, or cast aspersions on the independence and integrity of the judiciary and the judicial process in the context of an ongoing active suit, there will obviously be a breach of the sub judice rule and will be an act of contempt, as was the case in *Murray Hiebert*.

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E **[36]** I cannot find these elements here. In a larger constitutional context, the law of contempt must necessarily bend to the higher liberty of freedom of expression, not the reverse.

[37] The Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corporation* (1995) 120 DLR 12 (a case highlighted to this court by Mr Tommy Thomas) has adopted, in my opinion, the correct approach in constitutional interpretation in the area of media freedom and freedom of expression generally. As such, the common law rule in relation to sub judice has to be molded accordingly in the light of fundamental liberties provisions. The Canadian Supreme Court said:

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> It is open to this court to 'develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution': Dolphin Delivery … I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter (the Canadian Charter of Human Rights). Given that publication bans by their very definition, curtail the freedom of expression of third parties, I believe the common law must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:
>
> A publication ban should only be ordered when:
>
> (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, 'because reasonably alternative measures will not prevent the risk; and

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(b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban (per Lamer CJC, at pp 37– 38).

[38] These persuasive principles, emanating from such an illustrious court, can be considered as forming a good jurisprudential basis to decide cases such as the present. I cannot believe the sensitivities of the average Malaysian can be so different so as to incline us to adopt a completely different juristic approach which relegates freedom of expression below the sub judice rule.

CONCLUSION

[39] As I said at the outset, the preliminary governing principles on sub judice and contempt require the court to tread very carefully when an allegation of contempt or to commit a citizen to prison for it, comes before the court. The court has be satisfied on a high burden of proof that the administration of justice has been sullied or compromised. Ultimately, the test of possible or likelihood of prejudice has to have reference to the professional judge who will be hearing the case, not a collection of layman jurors — a system which has ceased to exist in our system of civil litigation. I would have thought it will require more than a criticism of a litigant in a media of limited circulation (such as *Harakah*) to influence a judge to be somehow prejudiced against the litigant criticised.

[40] On the present facts and based on the case authorities and the law as analysed above, I therefore do not find the allegation of contempt proven against the respondents and as such I am dismissing this application by Syabas with costs of RM40,000 to be paid by the applicant to the respondents.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed